

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD,
DIVISION OF JUDGES**

TBC CORPORATION and
RETAIL GROUP, INC.,
a wholly-owned subsidiary of
TBC CORPORATION

and

LUIS RODRIGUEZ, an Individual

**CASE 12-CA-157478
12-CA-170543**

**RESPONDENT TBC CORPORATION AND TBC RETAIL GROUP'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Submitted by:

Shane T. Muñoz
Nicole Bermel Dunlap

FORDHARRISON LLP
101 E. Kennedy Boulevard, Suite 900
Tampa, Florida 33602-5133
Telephone: (813) 261-7800
Facsimile: (813) 261-7899

Attorneys for TBC Corporation and TBC
Retail Group, Inc.

Respondents TBC Corporation and TBC Retail Group (collectively “Respondents”), by and through their undersigned counsel, and pursuant to Section 102.46 of the Board’s Rules and Regulations, hereby file their exceptions to the Decision and Order issued by Administrative Law Judge Michael A. Rosas (“ALJ”) on October 14, 2016 (“ALJD”). In accordance with Section 102.46(c), the analysis, rationale, and legal precedent supporting these exceptions are fully set forth in the accompanying brief.

I. EXCEPTIONS TO THE ALJ’S FINDINGS OF FACT

Respondents except to the following findings of fact and conclusions on the ground that they are either unsupported or not supported by the weight of the evidence in the record:

1. Respondents except to the ALJ’s finding and conclusion that the named Respondents are identified in the ALJD as “TBC – Tire & Battery Corporation d/b/a/ TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC – Tire & Battery Corporation d/b/a TBC Corporation” because those are not the Respondents identified in the parties’ Joint Motion and Stipulated Record. (ALJD at 1, 10:31–34, 11:38–40).
2. Respondents excepts to the ALJ’s finding and conclusion that its findings of fact were based on the entire record “including [his] observation of the demeanor of the witnesses,” since this case was submitted on a stipulated record and there were no witnesses. (ALJD at 2:12–14).
3. Respondents except to the ALJ’s finding and conclusion that both Respondents have been engaged in the business of operating a chain of retail tire and auto maintenance stores through Florida, as that is inconsistent with the parties’ Joint Motion and Stipulated Record. (ALJD at 2:20–22).

4. Respondents except to the ALJ's finding and conclusion as to the "pertinent" provisions of the Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions, as it does not state in full the paragraphs pertaining to the parties' agreement to arbitrate or regarding class actions (and expressly excludes the portions relied upon by Respondents in their post-trial brief). (ALJD 3:15–30).
5. Respondents except to ALJ's finding and conclusion that "[f]rom November 1, 2010 until April 14, 2016, the Respondents maintained a 2010 Associate Handbook which includes a no solicitation provision." (ALJD 4:33–34).
6. Respondents except to the ALJ's finding and conclusion that "The Respondents contends [sic.] that the Arbitration Agreement does not violate the Act because: (1) the FAA requires that the Arbitration Agreement must be enforced as written; (2) a federal court has already entered an order enforcing the Arbitration Agreement; and (3) neither the General Counsel nor Charging Party ever argued to that court that the arbitrations were unlawful under the Act, any reconsideration of the district court's decision should be barred on equitable principles," as it excludes numerous arguments made by Respondents in their post-trial brief. (ALJD 6:38–7:4).
7. Respondents except to the ALJ's finding and conclusion that "The Respondents rely on *Circuit City Stores, Inc.*, 532 U.S. 105 (2001) for the proposition that the waiver merely affects employees' procedural, not substantive, rights to pursue collective action." (ALJD 7:46–8:2).

II. EXCEPTIONS TO THE ALJ'S CONCLUSIONS OF LAW

Respondents except to the following specific conclusions of law on the ground that they are not supported by the weight of the record evidence and are contrary to established law and Board policy.

1. Respondents except to the ALJ's finding and conclusion that the Respondents identified as "TBC – Tire & Battery Corporation d/b/a/ TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC – Tire & Battery Corporation d/b/a TBC Corporation." constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act because those are not the Respondents identified in the parties' Joint Motion and Stipulation. (ALJD at 10:31–34).
2. Respondents except to the ALJ's finding and conclusion that Respondents' Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions violates Section 8(a)(1) of the Act. (ALJD at 9:7–9).
3. Respondents except to the ALJ's application of the legal standard stated in *D.R. Horton*, 357 NLRB No. 184 (2012), *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *Lutheran-Heritage Village-Livonia*, 343 NLRB 646 (2004), and their progeny to the record evidence presented in this case. (ALJD at 6:30–36, 7:7:8–18, 7:38–41).
4. Respondents except to the ALJ's finding and conclusion that the right to participate in a class or collective action is a substantive right, rather than a procedural right. (ALJD 6:34–36).
5. Respondents except to any finding by the ALJ that employees would reasonably

construe the Arbitration Agreement Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions to prohibit protected activity under Section 7 of the Act. (ALJD at 8:10–11).

6. Respondents except to the ALJ’s application of and adherence to the NLRB’s holdings in *D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and the Circuit Court of Appeals decisions in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016) to the extent those holdings have been or should be overturned by the United States Supreme Court, as well as any reviewing Court of Appeal (ALJD at 7:8–36).
7. Respondents except to the ALJ’s failure to apply and adhere to *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).
8. Respondents except to the ALJ’s application of and adherence to the NLRB’s holding in *MasTec Services Co.*, 363 NLRB No. 81 (2015). (ALJD 8:4–11).
9. Respondents except to the ALJ’s finding and conclusion that employees do not have any right to waive statutorily protected rights. (ALJD at 8:4–11).
10. Respondents except to the ALJ’s finding and conclusion that “Respondents’ additional reliance on the doctrines of res judicata, collateral estoppel, laches and/or waiver based on the federal court’s determining granting the motion to compel arbitration, is unavailing.” (ALJD at 8:28–30).
11. Respondents except to the ALJ’s finding and conclusion that “court judgments are not given collateral estoppel effect in Board proceedings.” (ALJD at 8:30–32).
12. Respondents except to the ALJ’s finding and conclusion that “if the Board was

not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully” and “if the federal agency was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.” (ALJD 8:32–39, 8:45–9:1)

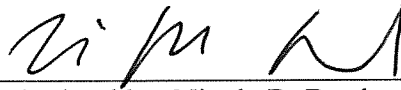
13. Respondents except to the ALJ’s application of and adherence to the NLRB’s decisions in *Field Bridge Associates*, 306 NLRB 322 (1922) and *Roadway Express, Inc.*, 355 NLRB 197 (2010). (ALJD at 8:30–35).
14. Respondents except to the ALJ’s finding that “Charging Party, Desimoni and Reiter are entitled to recover all reasonable litigation expenses and attorneys’ fees incurred in opposing the Respondents’ motion to compel arbitration in the FLSA Lawsuits.” (ALJD 9:9–10, 11:19–26).
15. Respondents except to the ALJ’s finding and conclusion that “Respondents’ repudiation of the 2010 no solicitation rule . . . was still ineffective under the Board’s standard set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978).” (ALJD at 10:15–19).
16. Respondents except to the ALJ’s finding and conclusion that the Posted Notices “did not adequately explain the reasons for replacing the 2010 rule with the 2016 no solicitation policy, including the unfair labor practices being remedied.” (ALJD at 10:19–22).
17. Respondents except to the ALJ’s application of and adherence to the NLRB’s decision in *Lily Transportation Corp.*, 362 NLRB No. 64, slip op. at 1 (2015).

(ALJD at 10:19–22)

18. Respondents except to the ALJ's finding and conclusion that "Respondents continued engaging in unfair labor practices after the repudiation by maintaining the [Arbitration Agreement Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions]." (ALJD at 10:22–24).
19. Respondents except to the ALJ's application of and adherence to the NLRB's decision in *Douglas Division, The Scott & Feltzer Company*, 228 NLRB 1016 (1977). (ALJD at 10:22–24).
20. Respondents except to the ALJ's finding and conclusion that "Respondents TBC – Tire & Battery Corporation d/b/a/ TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC – Tire & Battery Corporation d/b/a TBC Corporation, constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act" because those are not the Respondents identified in the parties' Joint Motion and Stipulation. (ALJD at 10:31–34).
21. Respondents except to the ALJ's finding and conclusion that "[s]ince March 13, 2014, the Respondents have violated Section 8(a)(1) of the Act by maintaining and enforcing an Arbitration Agreement requiring employees to resolve employment-related disputes exclusively through individual arbitration, and forego any right they have to resolve such disputes through class or collective action." (ALJD at 10:36–39).
22. Respondents except to the ALJ's finding and conclusion that "[s]ince November 1, 2010, the Respondents have violated Section 8(a)(1) of the Act by maintaining

a policy prohibiting employees from soliciting other employees during non-working time of the involved employees, prohibiting employees from soliciting in working areas during non-working time, and requiring employees to get permission from management before engaging in solicitation during non-working time.” (ALJD at 10:41–45).

23. Respondents except to the ALJ’s finding that “Respondent be required to reimburse Charging Party Rodriguez and other FLSA Lawsuit plaintiffs for any litigation and related expenses, with interest, to date and in the future, directly related to Respondent’s [sic.] filing its motion to compel arbitration in *Corey Desimoni & James Reiter, individually & on behalf of all similar situated v. TBC Corporation*, Case No. 2:15-c-v-366-UA-CM (M.D. Fla. 2016).” (ALJD at 11:19–23).
24. Respondents except to the ALJ’s finding that “Respondents shall also be required to move the United States District Court for the Middle District of Florida jointly with the Charging Party on request, to vacate their order compelling arbitration and permit employees to proceed with class action claims regarding wages, hours and/or working conditions in some forum, whether arbitral or judicial.” (ALJD at 11:28–31).
25. Respondents except to the ALJ’s finding and conclusion that his order is applicable to “TBC – Tire & Battery Corporation d/b/a/ TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC – Tire & Battery Corporation d/b/a TBC Corporation” because those are not the Respondents identified in the parties’ Joint Motion and Stipulation. (ALJD at 11:38–40).



Submitted by: Nicole B. Dunlap
Shane T. Muñoz
Florida Bar No. 67024
smunoz@fordharrison.com

Nicole Bermel Dunlap
Florida Bar No. 116158
ndunlap@fordharrison.com

FORDHARRISON LLP
101 E. Kennedy Boulevard, Suite 900
Tampa, Florida 33602-5133
Telephone: (813) 261-7800
Facsimile: (813) 261-7899

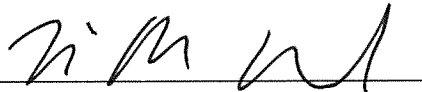
Attorneys for TBC Corporation and TBC Retail
Group, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlr.gov and was duly served electronically upon the following named individuals on this 11th day of November 2016:

Dallas L. Manuel, II
Counsel for the General Counsel
National Labor Relations Board, Region 12
Fifth Third Center, Suite 530
201 E. Kennedy Blvd.
Tampa, FL 33602
dallas.manuel@nlrb.gov

Bernard Mazaheri
Morgan & Morgan
20 N. Orange Ave., Suite 1600
Orlando, FL 32801
bmazaheri@forthepeople.com

/s/ 
Attorney

WSACTIVE LLP:8828937.1